

123 FERC ¶ 61,035
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Niagara Mohawk Power Corporation

Docket Nos. ER07-539-003
ER07-539-004
ER07-540-003
ER07-540-004

ORDER ON REHEARING AND COMPLIANCE FILINGS

(Issued April 17, 2008)

1. On November 29, 2007, Niagara Mohawk Power Corporation (Niagara Mohawk) filed requests for rehearing of an earlier order¹ which accepted Niagara Mohawk's filings of two contracts in the captioned dockets, denied waiver of the 60-day prior notice requirements, and ordered refunds. On November 29, 2007, Niagara Mohawk also made a compliance filing in each docket. In this order, the Commission grants rehearing, and dismisses Niagara Mohawk's compliance filings as moot.

Background

2. On February 14, 2007, in Docket No. ER07-539-000, as subsequently supplemented and amended, Niagara Mohawk filed an Interchange Agreement (IA) with Cornwall Street Railway Light and Power Company, Ltd., (Cornwall), entered into in 1992, and requested waiver of the Commission's 60-day prior notice requirement. Also on February 14, 2007, in an unrelated filing in Docket No. ER07-540-000, Niagara Mohawk filed an Interconnection Construction Agreement (ICA) between Niagara Mohawk and Canadian Niagara Power Company, Inc. (CNP) entered into in 1998 and a 1999 amendment to this agreement, and again requested waiver of the Commission's 60-day prior notice requirement.

3. The Cornwall IA provides for interconnection, transmission, and sale of power "so as to provide mutual assistance during emergency conditions and in general to provide access to economic sources of electricity. . . ."² The Cornwall IA specifies the

¹ *Niagara Mohawk Power Corp.*, Docket Nos. ER07-539, *et al.* (Oct. 30, 2007) (unpublished letter order) (October 30, 2007 Order).

² Cornwall IA at 1.

interconnection facilities relevant to the Cornwall IA as lines CD#1 and CD#2 running from Niagara Mohawk's Dennison terminal in New York to terminals located in Canada. Niagara Mohawk states that lines CD#1 and CD#2 are transmission facilities owned by the Long Sault Division (Long Sault) of Alcoa Power Generating, Inc.³ and covered by Presidential Permit 24⁴ and over which NYISO is authorized to cause the export of emergency energy pursuant to DOE Order No. EA-227.

4. The CNP ICA provides for construction, operation, and maintenance of an upgrade to the interconnection between CNP's system, located in Canada, and Niagara Mohawk's existing Huntley-Linde 38 kV transmission line No. 46. According to Niagara Mohawk, this line runs from the Huntley-Linde substation through Switch 998 and then through Terminal House B to the U.S.-Canadian border at Buffalo, New York, a distance of less than two miles. It states that DOE issued Presidential Permit No. 190 which authorized Niagara Mohawk to upgrade the facilities from Terminal House B to the Canadian border

5. In the October 30, 2007 Order, following responses to a deficiency letter and other orders, the Commission accepted both the Cornwall IA, as amended, and the CNP ICA in a single order, but denied waiver of the 60-day prior notice requirements and ordered Niagara Mohawk to refund the time value of revenues collected under each agreement.⁵

6. Cornwall and CNP each filed to intervene and a motion to be permitted to answer and an answer to the requests for rehearing in the separate dockets regarding their respective contracts. Niagara Mohawk filed an answer to CNP's Answer.

Procedural Matters

7. Pursuant to public notice issued February 20, 2007, interventions and protests to Niagara Mohawk's filings in Docket Nos. ER07-539-000 (Cornwall IA) and ER07-540-000 (Cornwall ICA) were due by March 7, 2007. Cornwall and CNP are seeking to intervene late in the proceedings in order to answer the rehearing requests after issuance of the October 30, 2007 Order. After issuance of an order in a proceeding, a petitioner

³ Niagara Mohawk states that, at one time, it leased capacity on the Long Sault transmission assets in order for Niagara Mohawk to provide commodity service to Cornwall but that capacity lease terminated in April 1999.

⁴ A Presidential Permit is required for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the transmission of electric energy between the United States and a foreign country and is administered by the Secretary of Energy as authorized by Executive Order 10485.

⁵ *Id.*

for late intervention bears a higher burden to show good cause and generally it is Commission policy to deny late intervention at the rehearing stage.⁶ We find that the circumstances here are unique because the issue raised late in the proceeding was one of jurisdiction. Although Niagara Mohawk effectively conceded Commission jurisdiction by initially filing the IA and the ICA with the Commission, upon rehearing, Niagara Mohawk belatedly raised the question of whether the Commission in this instance has jurisdiction, a question of fundamental concern. In these highly unusual circumstances, the Commission grants Cornwall's and CNP's late interventions.

8. Further, Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2007), prohibits an answer to a request for rehearing. Cornwall and CNP nevertheless move to be permitted to answer the rehearing requests regarding their respective contracts. In the instant proceeding, jurisdiction is at issue and Niagara Mohawk first introduced the question of the Commission's jurisdiction and the facts in support of its argument against Commission jurisdiction in its requests for rehearing of the Commission's October 30, 2007 Order. Thus, we find that the unique circumstances in these proceedings involving as they do the issue of jurisdiction and that this issue was first raised on rehearing, warrant the acceptance of Cornwall's and CNP's answers to the requests for rehearing, as well as acceptance of Niagara Mohawk's answer.⁷

Requests for Rehearing

9. Niagara Mohawk filed separate requests for rehearing of the October 30, 2007 Order in regard to the Cornwall IA and the CNP ICA on the grounds that the Commission does not have, and should not have exercised, jurisdiction over these agreements. Niagara Mohawk bases its argument on sections 202(e) and 202(f) of the Federal Power Act (FPA)⁸ which address transmission of electric energy from the United States to a foreign country. Under the Department of Energy Organization Act,⁹ the Department of Energy (DOE), rather than the Commission, administers FPA sections 202(e) and (f). Niagara Mohawk also relies on Presidential Permits 24 and 190, as discussed below.

⁶See, e.g., *Williston Basin Interstate Pipeline Co.*, 112 FERC ¶ 61,038, at P 12 (2005); *Williston Basin Interstate Pipeline Co.*, 81 FERC ¶ 61,033, at 61,178 (1997) citing *Transcontinental Gas Pipeline Corp.*, 79 FERC ¶ 61,205 (1997); *Cameron LNG*, 112 FERC ¶ 61,146, at P 6 (2005).

⁷ See *Northern Natural Gas Co.*, 119 FERC ¶ 61,035, at P 10 (2007).

⁸ 16 U.S.C. §§ 824a(e), (f) (2000).

⁹ 42 U.S.C. § 7172(f) (2000) ("No function described in this section which regulates the exports or imports of . . . electricity shall be within the jurisdiction of the Commission unless the Secretary assigns such a function to the Commission.").

Docket No. ER07-539-003 -- Cornwall IA**Niagara Mohawk's Rehearing Arguments**

10. Niagara Mohawk states that the Cornwall IA concerns exports of electricity to Canada, which are within the jurisdiction of the DOE under subsection 202(e) of the Federal Power Act,¹⁰ and that, even if the Commission were to conclude that the Cornwall IA is subject to its jurisdiction, the transactions at issue were involuntary, inadvertent, and unintentional, making refunds unwarranted. Niagara Mohawk states that the Cornwall IA was executed due to the desire, among other reasons, “to maintain both of the direct interconnections between their respective transmission systems . . . so as to provide mutual assistance during emergency conditions.”¹¹

11. Niagara Mohawk states that the New York Independent System Operator, Inc. (NYISO) sought and received authorization from DOE to export emergency energy and inadvertent energy to Canada over existing international transmission facilities owned and operated, pursuant to Presidential Permits, by Long Sault, New York Power Authority, and Niagara Mohawk.¹² According to Niagara Mohawk, on two occasions in 2003 and 2004, the NYISO provided emergency energy to Cornwall. Niagara Mohawk states that this power flowed from the Dennison substation over the Long Sault transmission facilities to Cornwall but, because Cornwall is not a NYISO customer, Niagara Mohawk states that NYISO recorded and charged this delivery of emergency energy as a delivery to Niagara Mohawk's load as measured at the Dennison substation. Niagara Mohawk states that it then sought, and subsequently received, reimbursement from Cornwall. Thus, Niagara Mohawk contends that these two transactions were exports to Canada and were undertaken pursuant to DOE Order No. EA-227 and section 202(e) of the FPA. Niagara Mohawk notes that DOE has delegated certain authority to the Commission under section 202(e),¹³ but states that the delegated authority is limited to matters concerning open access transmission service and the rates, terms, and conditions of open access transmission service and, therefore, does not provide authority for the Commission to act in this proceeding. It states that the Cornwall IA and the charges for delivery of emergency energy to Cornwall are not related in any

¹⁰ *Citing Enron Power Marketing, Inc. v. El Paso Electric Co.*, 77 FERC ¶ 61,013, at 61,049 (1996), *reh'g denied*, 83 FERC ¶ 61,213 (1998) (*El Paso*).

¹¹ *Citing Cornwall IA* at 1.

¹² *Citing New York Independent System Operator, Inc.*, DOE Order No. EA-227 (2000).

¹³ *Citing Department of Energy Delegation Order*, No. 00-004.00A (May 16, 2006) (DOE Delegation Order).

manner to open access transmission services. Niagara Mohawk further notes that the DOE Delegation Order prohibits the Commission from revoking, amending or otherwise modifying Presidential Permits or Export Authorizations issued by DOE. Accordingly, for the foregoing reasons, Niagara Mohawk asserts that the Cornwall IA was not and is not a jurisdictional agreement and Niagara Mohawk was under no obligation to file it with the Commission. Niagara Mohawk requests that the Commission grant rehearing and withdraw its order directing Niagara Mohawk to make refunds.

12. Finally, Niagara Mohawk argues that, even if the Commission were to conclude that the Cornwall IA is subject to its jurisdiction, the Commission should exercise its discretion and reverse its order directing refunds as the two energy transactions with Cornwall were involuntary, inadvertent, and unintentional.

Cornwall's Answer

13. Cornwall contends that the Commission has jurisdiction over the Cornwall IA under its finding in *El Paso* that it has jurisdiction up to the point of export, or, in the alternative, DOE has delegated to the Commission authority over the rates, terms, and conditions of open access transmission service including the Cornwall IA. In addition, Cornwall contends that the refund is appropriate under the Commission's *Prior Notice* policy.¹⁴

14. Cornwall states that, contrary to Niagara Mohawk's argument that *El Paso* provides that FPA sections 202(e) and (f) govern cross-border transmission to a foreign country, *El Paso* in fact demonstrates that the Commission has jurisdiction over the Cornwall IA. Cornwall states that *El Paso* involved a very different factual situation where the Commission considered whether it could compel El Paso Electric Co. (EPE) to provide transmission both within the United States and across the U.S.-Mexican border. Cornwall states that the Commission found that it could compel transmission up to the point of export, where DOE's section 202(e) jurisdiction began. Cornwall states that in the instant case, there is no compelled jurisdiction but, more importantly, *El Paso* supports Commission jurisdiction through its finding that "where export facilities connect with interstate facilities, the Commission's jurisdiction attaches up to the point of export."¹⁵ Cornwall states that Niagara Mohawk and Cornwall are not directly interconnected; rather, they are connected through Long Sault's CD#1 and CD#2 transmission lines which connect the Dennison substation on Niagara Mohawk's system across the United States-Canadian border to Cornwall's substations. Thus, it asserts, the point of export is not even on Niagara Mohawk's system; rather, it states, it is located on

¹⁴ *Prior Notice and filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,979, *order on reh'g*, 65 FERC ¶ 61,081 (1993) (*Prior Notice*).

¹⁵ *El Paso*, 83 FERC at 61,947.

Long Sault's transmission lines, which lie between Cornwall and Niagara Mohawk and cross the U.S.-Canadian border. Cornwall argues that El Paso does not support Niagara Mohawk's position because facilities at issue in the Cornwall IA and the performance by Niagara Mohawk under that agreement are all part of the interstate grid south of the border between the U.S. and Canada. Cornwall adds that Niagara Mohawk admitted in its rehearing request that when Cornwall receives jurisdictional service from NYISO, NYISO tags load going to Cornwall through Niagara Mohawk's system and over the Long Sault lines "as part of Niagara Mohawk's total zonal load."¹⁶ Under this agreement, Cornwall asserts, Niagara Mohawk committed to operate and maintain equipment on its own system, and cooperate with Cornwall in coordinating its maintenance of such equipment. Thus, Cornwall asserts, these obligations are being performed not on facilities subject to a Presidential Permit but on jurisdictional facilities which are part of the interstate grid owned and operated by Niagara Mohawk.

15. Cornwall further argues that even if the Commission were to determine that *El Paso* governed its exercise of jurisdiction over the Cornwall IA, it would still have jurisdiction pursuant to DOE's delegation to the Commission of a part of its section 202(e) authority to address the open access aspects of cross-border transmission. Cornwall states that in 2006 DOE carved out an exception to its section 202(e) jurisdiction, granting the Commission authority over the provision of open access transmission service by holders of Presidential Permits, including the rates, terms and conditions of such service.¹⁷ Cornwall adds that all Presidential Permits are subject to this carve-out.

16. Cornwall states that the Cornwall IA covers the mutual obligation by Cornwall and Niagara Mohawk to operate and maintain their own systems to provide service to each other, as well as rates, terms and conditions of any purchase or sale of electric energy during emergency conditions by either party. Cornwall states that there can be no doubt that Niagara Mohawk's interstate system is involved in providing the power to be transmitted to Cornwall via Long Sault's lines. Therefore, Cornwall contends that these activities go to the heart of the Commission's open access jurisdiction and that the October 30, 2007 Order falls squarely within the authority delegated to the Commission by DOE.

17. Finally, Cornwall argues that the refund requirement of the October 30, 2007 Order is fully consistent with the Commission's *Prior Notice* policy. Cornwall states it is the time value of the revenues collected under the Cornwall IA, not the revenues themselves, that is being refunded. According to Cornwall, the Commission's *Prior Notice* policy does not take into account the nature of the agreement or transactions

¹⁶ *Citing* Niagara Mohawk Request for Rehearing, Docket No. ER07-539-003 at 6.

¹⁷ *Citing* DOE Delegation Order.

involved in a filing violation and, thus, Niagara Mohawk's argument that the transactions were involuntary, inadvertent, and unintentional is irrelevant.

Docket No. ER07-540-004 -- CNP ICA

Niagara Mohawk's Rehearing Arguments

18. Niagara Mohawk states that the CNP ICA concerns cross-border facilities used solely for the export of electricity to Canada and, accordingly, those facilities are subject to the jurisdiction of DOE under sections 202(e) and (f) of the FPA.¹⁸ Further, Niagara Mohawk reiterates that, while the DOE has delegated certain authority to the Commission concerning cross-border transmission facilities,¹⁹ the delegated authority is limited to matters concerning open access transmission service and the rates, terms, and conditions of open access transmission service.²⁰ Moreover, it reiterates, the DOE Delegation Order prohibits the Commission from revoking, amending or otherwise modifying Presidential Permits or Export Authorizations issued by DOE. Niagara Mohawk states that, likewise, the DOE Delegation Order does not provide authority over the CNP ICA, which pertains solely to the allocation of the cost of construction of facilities and charges for operation and maintenance of those facilities.

19. Niagara Mohawk states that, in *El Paso*, the Commission held that it had jurisdiction over facilities running up to the last substation on the U.S. side of the border, and that DOE had jurisdiction over those facilities located between that last U.S. substation to the border.²¹ Niagara Mohawk asserts that the facilities covered by the CNP ICA are after the last substation in the U.S. and, therefore are not subject to the Commission's jurisdiction. Niagara Mohawk states that on December 22, 1998, the DOE issued Presidential Permit No. 190 to Niagara Mohawk, which authorized Niagara Mohawk to upgrade the facilities on the U.S. side of the border from Terminal House B to the Canadian border and expressly provided that the CNP facilities from Terminal House B to the border "may be operated only as an emergency/alternate source of electric supply to CNP and only when CNP loses its normal supply from Ontario hydro."²² Niagara Mohawk states that the CNP ICA covers the construction, operation, and maintenance of electric transmission facilities located between Switch 998 through

¹⁸ *Citing El Paso*, 77 FERC at 61,049.

¹⁹ *Citing* DOE Delegation Order.

²⁰ *Citing* 42 U.S.C. § 7101, et seq. (2000).

²¹ *Citing El Paso*, 77 FERC at 61,048.

²² *Citing* Presidential Permit No. 190 at Article 3.

Terminal House B to the Canadian border.²³ Specifically, Niagara Mohawk states that, under the CNP ICA, Niagara Mohawk upgraded the Huntley-Linde transmission line #46 from Switch 998 through Terminal House B to the United States-Canada border at Buffalo, New York, a distance of less than two miles. Niagara Mohawk states that CNP constructed the upgrades on the Canadian side of the border. Niagara Mohawk asserts that the last United States-based substation is the Huntley Substation which is located before Switch 998. Niagara Mohawk further states that the facilities from Switch 998 to the border are not integrated with any other transmission assets, that the facilities are not used to serve any United States load, and that they are used exclusively for the export of emergency energy to CNP when CNP loses its normal supply from Ontario Hydro.²⁴ Niagara Mohawk asserts that, since the last U.S.-based substation is the Huntley Substation which is located before Switch 998, the CNP facilities which are the subject of the CNP ICA are used solely for the export of electricity to Canada and are not subject to the Commission's jurisdiction. CNP asserts that, since the CNP facilities are not subject to the Commission's jurisdiction, neither is the CNP ICA which pertains solely to the allocation of the cost of construction of facilities which are not subject to the Commission's jurisdiction.

20. Further, Niagara Mohawk states that the DOE Delegation Order, which gives the Commission jurisdiction over section 202 facilities for open access purposes, does not provide authority for the Commission's actions in this proceeding with respect to the CNP ICA. Niagara Mohawk states that construction and maintenance services are not open access transmission services. Further, Niagara Mohawk states that Presidential Permit No. 190 expressly limits the use and operation of the CNP facilities from Terminal House B to the border in a manner that is inconsistent with the Commission's open access requirements, i.e., the facilities can only be used in emergency situations and must be operated in such a manner so as to preclude the parallel operation of the Niagara Mohawk and the Ontario Hydro systems. Niagara Mohawk states that the Commission's actions in this proceeding would effectively modify the restrictions placed by DOE under Presidential Permit No. 190 in violation of the DOE Delegation Order which prohibits the Commission from revoking, amending or otherwise modifying Presidential Permits. Thus, Niagara Mohawk asserts that the Commission cannot justify its action in this proceeding as within its delegated authority to require open access transmission services over cross-border facilities.

²³ Niagara Mohawk includes a schematic diagram of the relevant facilities as Attachment 1 to its Request for Rehearing in Docket No. ER07-540-004.

²⁴ In its Request for Rehearing in Docket No. ER07-540-004 at 6, Niagara Mohawk asserts that Switch 998 is normally open, and is closed only when CNP requires emergency service.

21. Niagara Mohawk states that because the CNP ICA is not subject to the Commission's agreement, it was under no obligation to file it, and it should not be required to refund the time-value of revenues collected under that agreement. Therefore, it contends that the Commission should reverse its decision directing Niagara Mohawk to make refunds.

CNP's Answer

22. CNP argues that the Commission has jurisdiction over the facilities and the CNP ICA under its precedent established in *El Paso* and because some of the facilities involved in the interconnection of Niagara Mohawk and CNP are outside of the scope of Niagara Mohawk's Presidential Permit. In addition, CNP argues that the Commission has jurisdiction over the rates, terms and conditions of cross-border open access transmission service, including the CNP ICA.

23. According to CNP, in *El Paso* the Commission defined the point of export as the last point at which the United States utility took an action to allow the power to be transmitted across the border, which in *El Paso* was at one of two substations where El Paso Electric Company would need to close a switch to allow the power to flow. CNP states that Niagara Mohawk presumably exercises some control over the flow of energy at Switch 998 which lies some distance to the north of the last substation. CNP concludes that if the point of export (i.e. last point of control) were at either Terminal House B or further down Line #46 either at the United States-Canadian border or at the facilities which Niagara Mohawk upgraded for CNP, then Commission jurisdiction would attach at that point. Thus, according to CNP, Niagara Mohawk has not demonstrated that the Commission lacks jurisdiction.

24. CNP also argues that even if the Commission were to determine that its jurisdiction is limited by the bounds of the Presidential Permit issued to Niagara Mohawk, the Commission still retains jurisdiction over the Interconnection Facilities and the CNP ICA. CNP states that the Presidential Permit describes the facilities as "one 115-kV, 60 Hz overhead transmission line located at Buffalo, New York, connecting Niagara Mohawk's Terminal House B with CNP's Ranking Substation located at Ft. Erie, Ontario, Canada (Circuit No. 7). Niagara Mohawk describes the subject facilities in its Rehearing Request as extending "between Switch 998 through Terminal House B to the Canadian border."²⁵ Thus, according to CNP, the Interconnection Facilities begin around Switch 998 and continue through Terminal House B, while the facilities covered by the Presidential Permit begin at Terminal House B. Therefore, CNP concludes that it paid for Niagara Mohawk to upgrade, operate, and maintain Interconnection Facilities outside of the scope of the Presidential Permit and, as such, those payments, as well as the

²⁵ Citing Niagara Mohawk Request for Rehearing, Docket No. ER07-540-004 at 7.

agreement which establishes the rates, terms, and conditions by which Niagara Mohawk provided the services and CNP paid for them are FERC-jurisdictional.

25. Like Cornwall, CNP further argues that even if *El Paso* were to govern the instant proceeding, the Commission would still have jurisdiction pursuant to DOE's delegation to the Commission of a part of its section 202(e) authority to address the open access aspects of cross-border transmission. CNP states that DOE carved out an exception to its section 202(e) jurisdiction for the Commission and that all Presidential Permits are subject to this carve-out. In addition, CNP states that Niagara Mohawk's Presidential Permit specifically states that "DOE is considering an administrative action that would apply the principles of non-discriminatory open access to all international transmission lines authorized by the Department, including this permit." CNP further states that the CNP ICA lists as its purpose the ability for CNP to enter into further agreements pursuant to Niagara Mohawk's Open Access Transmission Tariff, and that the CNP ICA covers the construction, operation and maintenance of facilities needed to effectuate an interconnection between CNP and Niagara Mohawk so that the contemplated transactions could occur.

Niagara Mohawk's Answer to CNP's Answer

26. On December 31, 2007, Niagara Mohawk filed an answer to CNP's pleading arguing that, contrary to CNP's claim, under the Commission's decision in *El Paso*, the point of export is the last *substation* on the United States-side of the border. Niagara Mohawk states that in this case the Huntley substation is the last substation on the United States-side of the border at which Niagara Mohawk can control the flow of power on Line 46.²⁶ Niagara Mohawk adds that even assuming *arguendo* that CNP is correct in asserting that the point of export is the "last point of control" and not the last substation on the United States-side of the border, Switch 998 is the last point of control since there is no switching capability at Terminal House B.

27. Niagara Mohawk notes that the fact that the Presidential Permit does not cover all of the CNP facilities is irrelevant because, as CNP itself states, "pursuant to *El Paso*, the Commission's jurisdiction extends to the point of export, regardless of whether this point exists before or after any facilities subject to a Presidential Permit."²⁷ Niagara Mohawk states that all of the parties agree that all of the CNP facilities are located between Switch 998 and the United States-Canadian border. Niagara Mohawk asserts that these facilities are not integrated with any other transmission assets, and they are not used to serve any

²⁶ Niagara Mohawk notes that it can control the flow of power on Line 46 at Switch 998 but Switch 998 is not a substation. *See* Niagara Mohawk December 31, 2007 Answer at 3 & n.1.

²⁷ *Citing* CNP Answer at 4.

United States load. Rather, according to Niagara Mohawk, they are used exclusively for the export of emergency energy to CNP and only when CNP loses its normal supply from Ontario Hydro. Thus, Niagara Mohawk argues, all of the CNP facilities are beyond the point of export and thus beyond the jurisdiction of the Commission.

Commission Determination

28. The Commission grants both requests for rehearing. FPA sections 202(e) and (f) address transactions with a foreign country. Under the Department of Energy Organization Act, however, DOE, rather than this Commission, administers sections 202(e) and (f).²⁸ Further, the DOE Delegation Order limits the section 202 authority delegated to the Commission to matters concerning regulation of open access transmission services. We thus agree with Niagara Mohawk that the Cornwall IA and the charges to Cornwall, as well as the CNP ICA, are subject to DOE jurisdiction under section 202 and not Commission jurisdiction, and, because these agreements do not involve open access transmission services, the DOE Delegation Order does not apply and does not give the Commission jurisdiction over these agreements.

29. The Cornwall IA concerns emergency power transactions pursuant to a Presidential Permit and Export Authorization issued by DOE. As such, the fact that the electricity ultimately exported to Canada under that agreement can be sourced back to Niagara Mohawk's system is irrelevant. Likewise, the CNP ICA concerns the construction, operation, and maintenance of transmission facilities pursuant to a Presidential Permit issued by the DOE.²⁹ The fact that the facilities constructed under the CNP ICA may not have corresponded exactly to the facilities authorized under Presidential Permit No. 190 is a matter to be addressed by DOE and is not within the Commission's jurisdiction. Accordingly, in light of the DOE authorizations governing these agreements, the Commission finds that it does not have jurisdiction over the Cornwall IA or the CNP ICA. Neither agreement should have been filed with the Commission in the first place.

30. Accordingly, the Commission grants rehearing and rescinds the October 30, 2007 Order.

²⁸ 42 U.S.C. §7171 (F) (2000); *see El Paso*, 77 FERC ¶ 61,013 at 61,046, *reh'g denied*, 83 FERC ¶ 61,213 at 61,947.

²⁹ We also note that all the subject facilities lie beyond the last substation on Niagara Mohawk's system in the United States (Huntley-Linde substation).

Compliance Filings

31. On November 29, 2007, Niagara Mohawk submitted separate refund reports in Docket Nos. ER07-539-004 and ER07-540-003 in compliance with the October 30, 2007 Order. In its respective refund reports, Niagara Mohawk indicated that it refunded \$135,094.50 to Cornwall and a total of \$2,364,985.31 to CNP.

Notice, Protests, and Interventions

32. Notice of Niagara Mohawk's November 29, 2007 compliance filings was issued December 4, 2007, with interventions and protests due on or before December 20, 2007. Cornwall timely filed a motion to intervene in Docket No. ER07-539-004. CNP filed a timely motion to intervene and protest in Docket No. ER07-540-003. CNP protests Niagara Mohawk's pro-rationing of the refunds calculated and paid to CNP.

Commission Determination

33. Because we grant Niagara Mohawk's requests for rehearing and rescind the October 30, 2007 Order, we dismiss the compliance filings as moot.³⁰

The Commission orders:

(A) Rehearing is hereby granted and the October 30, 2007 Order is hereby rescinded.

(B) Niagara Mohawk's compliance filings in the instant proceedings are hereby dismissed as moot.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁰ To the extent Niagara Mohawk has made refunds to Cornwall and CNP, in light of the findings in this order, the Commission would expect Niagara Mohawk to be able to recover from Cornwall and CNP the now-improperly refunded amounts pursuant to the terms of the contracts.